

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRUCE Q. McFADDEN)	
Claimant)	
VS.)	
)	Docket Nos. 234,703 & 234,704
HARRAH'S PRAIRIE BAND CASINO)	
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	
AND)	

ORDER

Respondent and its insurance carrier request review of the preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Bryce D. Benedict on August 7, 1998.

ISSUES

The Administrative Law Judge authorized Dr. Peter S. Lapse to provide claimant with medical treatment at the expense of the respondent and its insurance carrier. The Brief of Respondent and its Insurance Carrier in Support of Application for Review describes the issues as follows:

- "1) Whether the claimant met with personal injury by accident on January 26, 1998 and April 18, 1998.
- "2) Whether the claimant's alleged accidental injuries arose out of and in the course of his employment with the respondent.
- "3) Whether the claimant gave timely notice of the occurrence of his alleged accidents as required by K.S.A. 44-520."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In Docket No. 234,704, claimant alleges repetitive trauma injury to his right rotator cuff from scrubbing pots and pans in the course of his employment with respondent. The date of accident was initially described as January 26, 1998. During his preliminary hearing testimony, claimant indicated this accident date represented the date he first sought medical treatment for his right shoulder problems. It was pointed out, however, that the medical records reflect claimant actually first saw Dr. Terry L. Harter on January 24, 1998 and when asked whether that date should be the claimed date of accident, claimant answered in the affirmative.

On or about April 18, 1998 claimant received a specific traumatic injury to his right shoulder at work while washing dishes. He received an electrical shock and forcefully jerked his right arm. This accident is the subject of Docket No. 234,703.

Claimant testified that he had discussions with his supervisor, Trish Kading, about both accidental injuries and that he gave notice within 10 days of each alleged date of accident. Claimant's supervisor did not testify and there is no other direct testimony contradicting claimant's allegations of having suffered these work-related accidents to his shoulder. The medical records, however, do not support claimant's testimony concerning notice and accident because the initial medical treatment records following each alleged injury date fail to contain a history of a work-related injury. But there is no other explanation given for the right shoulder condition either. Claimant initially sought treatment in January 1998 for a rash as well as right shoulder pain. Although claimant told the doctor that he thought the shoulder pain could be related to the rash, he also testified that he attributed the rash to his work washing dishes.

The record consists only of claimant's testimony and the medical records offered as exhibits at the preliminary hearing. Those exhibits do not contain a history of a work-related accident until claimant's second visit to Dr. Lapse, but that entry describes claimant giving a history of injuring the shoulder at work sometime in late May.

The Administrative Law Judge notes not only that claimant is a poor historian but also describes getting the impression that claimant does not comprehend all of what is going on. The Appeals Board believes the inconsistencies in the record can be explained on this basis. In circumstances such as this, where there is conflicting evidence, the Appeals Board finds it appropriate to take into consideration an administrative law judge's unique position when assessing the credibility of witnesses that testify before him or her. Being able to evaluate the in-court testimony of witnesses does put an administrative law judge in a more favorable position than the Appeals Board in assessing credibility. Some deference, therefore, is generally accorded an administrative law judge's determination of credibility where he or she had the opportunity to observe the witness testify. This is one of those cases where the credibility of the claimant is of paramount importance to a determination of the issues. The Administrative Law Judge apparently found claimant to

be a credible witness because he awarded benefits based upon his testimony. Having reviewed the record in its entirety, the Appeals Board finds that the Administrative Law Judge's order should be affirmed.

As always, this determination is not binding but is subject to modification, given additional evidence, at a subsequent preliminary hearing or upon a full and final hearing on these claims. K.S.A. 1997 Supp. 44-534a(a)(2).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order for Medical Treatment entered by Administrative Law Judge Bryce D. Benedict dated August 7, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: George H. Pearson, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director